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NO. 80-1382

IN THE

Supreme Court of the United States

OCTOBER TERM 1980

WILLIAM H. MARX and FLORENCE MARX
his wife, et al.,
Petitioners,

v.

COMPUTER SCIENCES CORPORATION,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTION PRESENTED

Does the omission of known facts, in the absence of intent to deceive or recklessness, and in the good faith and reasonable belief that their omission would not render related disclosures misleading, constitute scienter under Section 10(b) and Rule 10b-5?

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INTRODUCTION

This case involves a luncheon speech to the New York Society of Security Analysts in which Mr. William R. Hoover, President of Computer Sciences Corporation ("CSC"), briefly summarized the history, nature and philosophies of the company. On the basis of hindsight, plaintiffs/petitioners (Marx) asserted that certain specific details of one of CSC's computer software

development programs should have been discussed. At the trial, Marx asserted to the trial court that the scienter requirement involved a showing of "knowledge that the omission makes the representation false or misleading" (TR 25) or that the omission was the result of reckless behavior (TR 23, 27-28). After trial on the scienter issue, the trial court explicitly found, on both a subjective and an objective basis, that there was no intent to deceive, defraud or manipulate investors and no reckless behavior -- the court also found that, to the contrary, Mr. Hoover made a good faith effort to be accurate, and believed, in good faith, that his speech was an accurate evaluation of CSC (FF 25, 28, 29, 30, 31). Upon Marx's motion for reconsideration, the trial court added explicit findings that Mr. Hoover's belief that the omitted facts did not render his speech misleading was

reasonable and that the evaluation of CSC that he portrayed in the speech was reasonable (FF 26, 27) -- that not even negligence was involved. These findings of fact were affirmed by the Ninth Circuit Court of Appeals. The only possible question presented by Marx's Petition for Writ of Certiorari, therefore, is:

QUESTION PRESENTED

Does the omission of known facts, in the absence of intent to deceive or recklessness, and in the good faith and reasonable belief that their omission would not render related disclosures misleading, constitute scienter under Section 10(b) and Rule 10b-5?

STATEMENT OF FACTS

I. General Background

Computer Services Corporation (CSC) is a Nevada corporation formed in 1959[1/]. By the fiscal year ended March 27, 1970, CSC revenues from worldwide operations exceeded $108,000,000. CSC stock is publicly traded, and by January, 1970 approximately 12,800,000 shares were issued and outstanding. Since its organization, CSC has engaged in the business of computer sciences programming, computer facilities management and technical support, and the development and sale of proprietary computer-oriented systems. CSC's business

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[1/] In compliance with Supreme Court Rule 28.1, CSC discloses that it has the following non-wholly owned subsidiaries: Computer Sciences - Canada, Ltd.; Computer Sciences of Australia, Pty, Ltd.; and Computer Services (Pty.) Ltd. (South Africa).

philosophy has stressed investment in and development of proprietary systems (FF 2,3)[2/].

II. Accounting Policy

During the period at issue, CSC's accounting policy was to capitalize all development costs of proprietary projects until the project became fully operational. Once the project became fully operational in the accounting sense, the costs accumulated during the development period were amortized over the estimated life of the project or five years, whichever was less. This reporting practice conformed to generally accepted accounting principles.

[2/] The trial court's Amended Findings of Fact and Conclusions of Law are appended to the Petition for Writ of Certiorari at A-1 et seq. For the sake of uniformity, Findings of Fact will be cited as "FF __" throughout this brief.

The determination to continue capitalizing or to commence expensing is an accounting reporting decision reached only in consultation with, and upon the approval of, CSC's independent auditors (FF 12).

III. Computicket

Four of CSC's specific proprietary computer-oriented systems in 1969 were Computax, Computicket, Computer Applications packages, and Infonet. The one drawn into issue by Marx's allegations is Computicket ("CT").

In 1967, CSC began development of a computerized reservation system - initially for theatrical, sporting and other entertainment events but later expanded to a broader base including campground reservations, golf tee time, etc. - through an 86.4 percent owned subsidiary, Computicket. As with prior and subsequent CSC projects, CT suffered a series of revised projections

of development periods and estimates of costs, technical difficulties, delays, and cost overruns. As the record amply documents, CSC periodically advised the public and its stockholders as to the status of CT, current estimates of its continuing development period, capitalized costs and risks. Specifically, prospectuses filed in April and September, 1969, and CSC's 1969 annual report disclosed:

- that CT had not commenced significant operations;
- that there was no assurance of CT's success;
- that during fiscal 1969 CT development costs of $4,266,000 had been capitalized;
- that during the sixteen months ended August 1, 1969 CSC had invested $6,200,000 in the development of CT (in addition to $8,700,000 for Infonet, $30,000,000 for its leasing business, plus other investments);
- that a substantial additional investment in CT would be required; and
- that the company's accounting policy was to capitalize costs during the development period and thereafter to amortize such costs over a maximum of five years, except that any unamortized balance would be expensed if a program were abandoned. (FF 12; Ex. A, 6, 39, 42)

In the summer and fall of 1969, CT was suffering from serious technical problems caused by third parties - primarily delays in AT&T's installation of data lines and deficiencies in the performance of ticket printers installed. In August, 1969, First National City Bank ("FNCB)") notified CT that it was terminating its agreement to act as a CT outlet. CT successfully negotiated a reinstatement of the FNBC agreement until December 31, 1969, which allowed CT to solicit and install alternative outlets in New York City.

During October, November and December, 1969, a series of meetings was conducted to review CT's operating problems. As a result of these sessions, all of the major technical problems were resolved and certain excessive CT cost buildups were identified and budget reductions imposed. As Mr. Hoover, CSC President, testified at

trial, during these reviews no one involved endorsed, proposed or even discussed abandoning CT. In fact, as the trial court found, CSC management enthusiastically committed itself to continuing CT (FF 16, 17).

In December, 1969 and January, 1970, CT was already improving. In December alone 15 new outlets were installed in the eastern region. Effective January 1, 1970 CT started a major program of campsite reservations for the State of California. Losses capitalized in December 1969, and January, 1970 were lower than any of the three prior months, and January revenues were approximately double those of the preceding four months' average.

As a result of the CT review, CSC sought and on January 20, 1970 received approval from its independent auditors to continue capitalizing CT costs until

August, 1970. CSC immediately prepared an 8-K statement which, after auditor approval, was filed with the SEC on January 28, 1970.

IV. Earnings Forecast

Mr. Hoover had an earnings forecast prepared which was reviewed by CSC management. Since the auditors had approved the continued capitalization of CT costs until August, 1970, no CT expenses were amortized in the forecast for fiscal 1970 (ending in March, 1970). In other words, on the premise then operative that development of CT would continue, the forecast was indisputably accurate (FF 6, 17, 21).

V. CSC Financing

As established at trial, CSC had the financial strength to proceed with all its existing projects in January 1970. In September, 1969 CSC had issued $50,000,000 in subordinated debentures on which no

principal payments were due until 1980. In November, 1969 CSC had negotiated a $15,000,000 credit line from the Bank of America, of which half remained unused at the time of Mr. Hoover's speech. The Bank of America continued to meet CSC's short term credit needs until September 1970, when CSC entered into a long term debt arrangement with a consortium of banks, including the Bank of America.

VI. Mr. Hoover's Speech

On January 23, 1970, Mr. Hoover gave a speech before the New York Society of Security Analysts (see Petition for Review at A-30 et seq.). There was a luncheon speech of 38 minutes' duration, followed by a question and answer period. The themes of this speech were signaled in its opening paragraph:

> In this presentation I will attempt to amplify some of the basic philosophies that have

> resulted in CSC's growth and capability as the leading firm in the computer software and information science field, and discuss those factors that will lead to continued growth in the future.

Id. at A-31 (emphasis supplied).

Mr. Hoover discussed, in general terms, the evolution of the computer-based information industry, the projected growth of the industry, CSC's basic managerial philosophies, organizational structure, technical base, acquisition program and proprietary programs. One sentence related specifically to CT:

> CSC then began the development of Computicket, a service which sells tickets to spectator events over a network of on-line terminals connected to a central computer with the inventory of seats to events in a given city.

Id. at A-46.

The speech conveyed the earnings forecast previously discussed. In the question and answer period Mr. Hoover

disclosed that neither Infonet nor Computicket had become fully operational, and that the company, consistent with its established accounting policy, did not anticipate writing down their development costs during the current fiscal year (FF 6, 9, 19). At the time of Mr. Hoover's address, CSC management neither knew, nor had reason to believe, that CSC would discontinue CT (FF 19).

Although the speech mentioned, in general terms, the substantial investment (Pet. at A-50), business risks (Pet. at A-44) and technological problems (Pet. at A-48) of CSC's development program, in its level of specifity it was intended as a philosophical overview of CSC's program and prospects (FF 8). It was intended to be, and in the judgment of Mr. Hoover, it was an accurate picture of CSC at that time and the trial court so found (FF 25, 26, 27).

VII. Subsequent Events

After the promising upturn in January, 1970, CT fell off badly in February and March. This was particularly disturbing to CSC because, though the technical problems had been resolved, marketing efforts were proving unsuccessful. In late March, 1970, CSC began to evaluate possible discontinuance of CT. In early April, 1970 the decision to abandon CT was reached - a matter of business judgment based upon the beliefs that CSC should not go forward with both CT and Infonet and that the latter was a more successful project (FF 18).

This decision was immediately disclosed. In accordance with its consistently applied accounting policy, CSC wrote off CT's deferred development costs. This write off reduced fiscal (1970) earnings per share by 47 cents from the $1.00 per share previously forecast (FF 20, 21, 22).

ARGUMENT

I. As the Court of Appeals Affirmed, the Trial Court's Findings of Fact Required Judgment for CSC Under Ernst & Ernst v. Hochfelder and its Progeny

A. The nucleus of scienter: intent

The theory of scienter urged upon this Court by Marx cannot be reconciled with either of the generally accepted formulations, both of which were applied by the trial court. The seminal definition was provided by this Court in Ernst & Ernst v. Hochfelder, 425 U.S. 185, 96 S. Ct. 1375, 47 L. Ed. 2d 668 (1976), which held that a private cause of action for damages under § 10(b) and Rule 10b-5 will not lie in the absence of an allegation of scienter. The Court explained: "In this opinion the term 'scienter' refers to a mental state embracing intent to deceive, manipulate, or defraud." 425 U.S. at 193 n.12, 47 L. Ed. 2d at 677 n.12. Last term

the Court reiterated this definition and extended its application to SEC enforcement actions. Aaron v. SEC, 446 U.S. 680, 100 S. Ct. 1945, 64 L. Ed. 2d 611 (1980).

In Hochfelder this Court reserved the question whether, in some circumstances, reckless behavior would be sufficient for civil liability under § 10(b) and 10b-5, although it recognized that "[i]n certain areas of the law recklessness is considered to be a form of intentional conduct for purposes of imposing liability for some act." 425 U.S. at 193 n.12, 47 L. Ed. 2d at 677 n.12 (emphasis supplied). The circuit courts which have resolved the issue unanimously agree that in some circumstances recklessness may satisfy the

scienter requirement[3/]. The generally accepted definition of recklessness in the omissions context is as follows:

> [R]eckless conduct may be defined as a highly unreasonable omission, involving not merely simple, or even inexcusable negligence, but an extreme departure from the standards of ordinary care, and which presents a danger of misleading buyers and sellers that is either known to the defendant or is so obvious that the actor must have been aware of it.

[3/] Edward J. Mawod & Co. v. SEC, 591 F.2d 588 (10th Cir. 1979); Mansbach v. Prescott, Ball & Turben, 598 F.2d 1017 (6th Cir. 1979); Nelson v. Serwold, 576 F.2d 1332 (9th Cir.), cert. denied, 439 U.S. 970, 99 S. Ct. 464, 59 L. Ed. 2d 431 (1978); Rolf v. Blyth, Eastman Dillon & Co., Inc., 570 F.2d 38 (2d Cir.), cert. denied, 439 U.S. 1039, 99 S. Ct. 642, 58 L. Ed. 2d 698 (1978); Coleco Industries, Inc. v. Berman, 567 F.2d 569 (3d Cir. 1977), cert. denied, 439 U.S. 830, 99 S. Ct. 106, 58 L. Ed. 2d 124 (1978); Sundstrand Corp. v. Sun Chemical Corp., 553 F.2d 1033 (7th Cir.), cert. denied, 434 U.S. 875, 98 S. Ct. 224, 54 L. Ed. 2d 155 (1977). The question is "unsettled" in the Fifth Circuit, Dwoskin v. Rollins, 634 F.2d 285, 289-90 (5th Cir. 1981), and has been reserved in the First Circuit, Cook v. Avien, 573 F.2d 685, 692 (1st Cir. 1978).

Sundstrand Corp. v. Sun Chemical Corp., 553 F.2d 1033, 1045 (7th Cir.), cert. denied, 434 U.S. 875, 90 S. Ct. 224, 54 L. Ed. 2d 155 (1977) (quoting Franke v. Midwestern Oklahoma Development Authority, 428 F. Supp. 719 (W.D. Okl. 1974) (emphasis supplied). The Sundstrand Corp. Court added that:

> the Franke definition of recklessness should be viewed as the functional equivalent of intent. Under this definition, the danger of misleading buyers must be actually known or so obvious that any reasonable man would be legally bound as knowing . . .

Id. (Emphasis supplied; citation and footnote omitted.)

In other words, the reckless defendant must have actual or constructive knowledge of the fraud, not merely of the omitted facts. As the Hochfelder Court recognized:

> There is no indication that Congress intended anyone to be made liable for such practices unless he acted other than in good faith. The catchall provision of § 10(b) should be interpreted no more broadly.

425 U.S. at 206, 47 L. Ed. 2d at 684 (emphasis supplied).

This doctrinal framework of scienter warrants three observations: First, both the Hochfelder and the Sundstrand Courts recognized recklessness as the functional equivalent of intent. Second, the recklessness formulation provides an objective standard which complements the subjective, state-of-mind test of Hochfelder. Third, both formulations of scienter impose result-oriented culpability standards: the defendant must either intend to mislead investors or know that his omission of material fact recklessly risks doing so[4/].

[4/] Addressing the two recognized standards of culpability, the Third Circuit has stated that scienter requires "'a conscious deception or . . . a misrepresentation so recklessly made that the

The theory proposed by Marx requires considerably less: knowledge merely of the omitted data regardless of the defendant's knowledge of materiality or misleading effect. Although what the defendant must know has generally been discussed in the recklessness context, the courts that have considered Marx's proposition have rejected it: "[K]nowledge of the fraud, and not merely the undisclosed material facts, is indispensable." Hirsch v. DuPont, 553 F.2d 750, 759 (2d Cir. 1977). Accord,

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Footnote 4 (continued)

culpability attaching to such reckless conduct closely approaches that which attaches to conscious deception.'" McLean v. Alexander, 599 F.2d 1190, 1197, (3d Cir. 1977) (quoting Coleco Industries, Inc. v. Berman, 423 F. Supp. 274, 296 (E.D. Pa. 1976), aff'd, 567 F.2d 569 (3d Cir. 1977), cert. denied, 439 U.S. 830, 99 S. Ct. 106, 58 L. Ed. 2d 124 (1978).

McLean v. Alexander, 599 F.2d 1190, 1202 (2d Cir. 1979)[5/]. As discussed infra, the theory of scienter which Marx proposes has not been accepted by a single circuit court. Therefore, the alleged "confusion" and "uncertainty" among lower courts regarding the requirements for scienter (Pet. at 16) are wholly an illusion contrived by Marx.

B. The trial court's findings

As previously noted, petitioner's current position represents a dramatic shift in legal theory from trial. The trial court applied both of the recognized

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[5/] See also Steinberg and Gruenbaum, Variations of Recklessness After Hochfelder and Aaron, 8 Securities Regulation L.J. 179, 200 (Fall, 1980) (The generally accepted recklessness standard requires "conduct so unreasonable that the danger resulting from it, presumably the fraud or deceit, must be presumed to have been known to the defendant." (emphasis in original)).

tests for scienter: intent to deceive or defraud, and recklessness. Judge Byrne concluded that Marx had failed to prove scienter under either standard (FF 29, 30)[6/].

Concerning the discontinuance of Computicket, the court determined that CSC had "enthusiastically" renewed that program in late calendar 1969 and was not considering discontinuance at the time of Hoover's address (FF 16, 17). Possible discontinuance was evaluated in late March, 1970, and decided upon in early April, 1970 (FF 18). Therefore, "[a]t the time of Hoover's address, neither Hoover, Jones nor CSC knew or had reason to believe that CSC was going to discontinue the operation of CT." (FF 19)

[6/] On appeal, Marx explicitly disavowed the recklessness standard in favor of his current theory. Br. of Appellants at 49.

CSC consistently applied its announced accounting policy of deferring CT development costs because CT never became operational (FF 15). Upon discontinuance of CT, CSC wrote off these costs as fiscal 1970 expenses. This write-off reduced the company's fiscal 1970 earnings by 47 cents per share (FF 22). But for this reduction (and two other adjustments unforeseen at the time of Hoover's speech) fiscal 1970 earnings would have approximated the predicted $1.00 per share (FF 22, 23).

The trial judge was uniquely able to evaluate the credibility of the witnesses. Applying both subjective and objective standards, he concluded:

> 25. At the time of the address, Hoover was aware of, but did not include in his speech, the facts discussed in these findings that related to his assertions, predictions and opinions about CSC. Those facts were not included because Hoover, in good faith, did not believe they were relevant to an

> accurate evaluation of the company's status and performance at that time.
>
> 26. Hoover's belief that the omitted facts did not render his speech misleading was not unreasonable.
>
> 27. The omitted facts did not render Hoover's assertions and predictions regarding CSC's future performance unreasonable.
>
> . . . .
>
> 29. In the address, Hoover did not make misstatements or omissions with the intent to deceive, defraud or manipulate investors.
>
> 30. In his address, Hoover did not recklessly misstate or omit facts. His behavior was not reckless.

In other words, Hoover lacked scienter by any accepted standard. Accordingly, the trial court entered judgment for CSC (Conclusions of Law 3, 4).

C. The Ninth Circuit's affirmance

On appeal Marx pursued alternative factual and legal theories. With benefit of hindsight, Marx inferred that at the time of Hoover's speech there was a likelihood of Computicket's discontinuance so

substantial that Hoover must have known and should have reported it. The trial court's contrary finding was upheld by the Ninth Circuit under the proper "clearly erroneous" standard. Pet. at A-24 (citing Fed. R. Civ. P. 52(a); United States v. United States Gypsum Co., 333 U.S. 364 (1948)).

Marx also sought reversal on the ground:

> that the [t]rial court's finding that Hoover made knowing omissions supports liability even if Hoover believed that his speech was an accurate portrayal of the company's financial picture, so long as the omitted facts were material.

Id. The appeals court noted that Marx had marshalled no authoritative support for this theory of scienter:

> All the cases plaintiffs cite in support of finding scienter despite a belief in the accuracy of the speech actually involve misrepresentations or omissions where the allegations were that the defendants knew or should have known they were misleading investors.

Id. at A-25 (emphasis supplied; citations omitted). In other words, plaintiffs' citation to recklessness cases failed to support its lesser standard, which the court rejected as a "negligence standard" proscribed by Hochfelder. Id. at A-26. Judgment for CSC was unanimously affirmed.

II. The Alleged Confusion Among Lower Courts As To What Constitutes Scienter Is An Illusion Contrived by Petitioner

A. The cases relied upon by petitioner either are inapposite or have been overruled

Marx claims that omission of known information, if material, constitutes knowing misconduct actionable under § 10(b) and Rule 10b-5 without any showing of intent or recklessness. Marx also alleges, as the ostensible basis for review, that some federal courts embrace this view and that there is consequently a division of authority, confusion and uncertainty among federal courts (Pet. 15-18).

Fortunately for petitioner, Rule 10b-5's strictures against misleading misrepresentations do not apply to a petition for writ of certiorari. Not one of the cited cases that is still good law actually holds what petitioner alleges.

Marx cites United States v. Chirarella, 558 F.2d 1358 (2d Cir. 1978), for the propositions that the meaning of scienter is unclear after Hochfelder and that fraudulent intent is not required. Nowhere does Marx disclose that the Chirarella decision was reversed by this Court, albeit on other grounds. 445 U.S. 222, 100 S. Ct. 1108, 63 L. Ed. 2d 348 (1980). Furthermore, whatever uncertainty the Chirarella court experienced it quickly resolved by adopting the recklessness standard, which the defendant had met because he had admitted at trial that he knew his conduct was "wrong" and "against

the SEC." 558 F.2d at 1371 n.19 (emphasis supplied).

Rochez Bros., Inc. v. Rhoades, 491 F.2d 402 (3d Cir. 1973), is a pre-Hochfelder decision which has subsequently been explained by the court which rendered it:

> We have no doubt that Rochez Bros. survives Hochfelder: a failure to disclose facts whose disclosure one knows to be necessary in order to avoid the risk of materially misleading a buyer or seller is actionable under § 10(b). . . . the general rule is that where intent is an element of an offense, it must be shown with respect to each other element thereof. In line with this rule, the Rochez standard requires knowledge, not only of the facts withheld, but also of the risk that the buyer or seller will be thereby misled.

McLean v. Alexander, 599 F.2d 1190, 1202 (3d Cir. 1979) (emphasis supplied).

Rochez is not the only case cited by Marx which actually repudiates his position. In Herzfeld v. Laventhol, Krekstein, Horwath & Horwath, 540 F.2d 27 (2d

Cir. 1976), liability was imposed on the ground that the defendants' audit was "materially and knowingly misleading." Id. at 34. The trial court had specifically found that defendants had "knowledge of the fact that the figures created a false impression" in addition to actual knowledge of the omitted facts which rendered the audit report misleading. Id. at 33. In contrast, Marx claims that only the latter knowledge, i.e., of the omitted facts themselves, should be required for scienter.

Marx quotes extensively from a recent D.C. Circuit decision which seemingly rejects the notion "that scienter requires an inquiry into 'the defendant's state of mind--his subjective belief as to the legality of his action. . . .'" SEC v. Falstaff Brewing Corp., 629 F.2d 62, 77 (D.C. Cir. 1980), cert. denied sub nom.

Kalmanovitz v. SEC, 66 L. Ed. 2d 471, 101 S. Ct. 569 (1980). This was a pre-Aaron SEC enforcement decision. Aaron, of course, extended to SEC proceedings the Hochfelder scienter requirement: "a mental state embracing intent to deceive, manipulate, or defraud." 64 L. Ed. 2d at 620 n.5. If Falstaff requires something less, as Marx asserts it does, then to that extent it is overruled by Aaron. These two cases may be reconciled, however, because the Falstaff court stated that scienter required both "knowledge of what one is doing" and knowledge of "the consequences of those actions. . . ." 629 F.2d at 77. In reference to the latter, the trial judge had found that the proxy statement involved was materially misleading and that the defendant, after reading it, "thought that the statement was fraudulent but elected to say nothing about it." Id.

at 67 (emphasis supplied). Thus the proxy statement had a materially misleading effect of which the defendant had actual knowledge. That fact pattern is neither supportive of petitioner's argument nor analogous to the facts in the instant case.

Petitioner does cite one district court case which clearly holds that actual knowledge of undisclosed material facts, without more, will sustain liability. See Valente v. Pepsico, Inc., 454 F. Supp. 1228, 1251-52 (D. Del. 1978). That decision is no longer good law in its own circuit. The Valente court relied on two precedents: Rochez Bros., supra, and the district court decision in McLean v. Alexander, 420 F. Supp. 1057 (D. Del. 1976). After Valente was decided, the Third Circuit reversed McLean and, as discussed supra, interpreted Rochez to

require "knowledge, not only of the facts withheld, but also of the risk that the buyer or seller will be thereby misled." 599 F.2d at 1202.

Finally we come to petitioner's last case, the district court decision In re Transocean Tender Offer Securities Litigation, 455 F. Supp. 999 (N.D. Ill. 1978). That court expressed the opinion that neither specific intent to deceive or harm investors nor an obvious danger of misleading (i.e., recklessness) was required, "where, as here, defendants concede that their conduct was knowing or deliberate. . . ." Id. at 1011-12. The court then proceeded to apply the recklessness standard, relegating the foregoing remarks to the realm of dicta:

> Nevertheless, even assuming arguendo that defendants are correct that there must be a showing here that nondisclosure created an obvious danger of misleading buyers

> or sellers, the decision of the Delaware Supreme Court is dispositive. . . . [That] Court had to conclude, and did conclude, albeit in different language, that the nondisclosure created an "obvious danger" of misleading the minority shareholders. . . .

Id. at 1012. Thus the district court ultimately relied for its holding on the "intentional or reckless test" which is the law in the Seventh Circuit under Sundstrand Corp., supra.

B. There is no conflict of authorities requiring resolution by this court

Petitioner's poetic license with the cases it cites does not disguise the total absence of judicial authority for its theory of scienter. The vacuum of support noted by the Ninth Circuit persists in the instant petition. The only conflict presented by the instant case is between petitioner and the array of judicial authorities that have unanimously adopted

scienter standards which petitioner failed to satisfy at trial.

CONCLUSION

Respondents in this matter prevailed after a lengthy, complex and thorough trial. The Court of Appeals for the Ninth Circuit unanimously affirmed the judgment of the trial court and denied petitioners' motion for reconsideration. It is time that this protracted litigation, which began eleven years ago, be granted deserved repose.

Petitioner has failed to demonstrate judicial support for its position, a conflict among the federal courts on the issue presented, or any other reason why

this Court should hear this case. The petition for writ of certiorari should therefore be denied.

Dated this 25th day of March, 1981.

Respectfully submitted,

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APPENDIX

TRANSCRIPT OF PROCEEDINGS
OPENING STATEMENT - PLAINTIFFS

. . . . (page 23)

MR. ARMSTRONG [Petitioner]: Well, recklessness will be a sub-issue in the case which the Court --

THE COURT: I think that any case, now, is going to have to decide the issue of reckless disregard. In other words, you only get to it if you don't find the higher level, if you don't find the intent to deceive and defraud. Then I think you have to make a finding, in fairness, as to whether there was reckless disregard, and if there was reckless disregard, whether that is sufficient.

. . . .

. . . . (page 25)

MR. HARTUNG [Petitioner]: The issue is: What is scienter?

THE COURT: Okay.

MR. HARTUNG: Scienter is the making of a false statement knowing at the time the statement is made it is false, and that is fraud. In respect to omissions, omission of a fact with knowledge that the omission makes the representation false or misleading is fraud.

. . . .

. . . . (pp. 27-28)

THE COURT: Here is what the issue is going to be.

. . . .

THE COURT: Did the defendant knowingly and intentionally make misstatements or omissions with the intent to deceive or defraud -- and the word "manipulate" could also be in there -- investors?

Secondly, as a sub-issue, in the absence of a factual finding of intent to deceive or defraud, if there is a factual finding of reckless behavior, is that sufficient to impose liability under Section 10b-5?